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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 LANCE R. MARTIN,
12 CDCR # E-17299,

13 Plaintiff,

14 vs.

15 T. HARRINSTON; L. MILLER;
16 C. OROZCO; CESCOLINI;
17 J. JUAREZ; S. MILLER;
HARRINGTON; ODELL,

18 Defendants.
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Civil No. 14cv2914 BEN (PCL)

**ORDER SUA SPONTE
DISMISSING SECOND AMENDED
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. § 1915(e)(2)(B)(ii)
AND 28 U.S.C. § 1915A(b)(1)**

21 I.

22 **PROCEDURAL HISTORY**

23 On December 8, 2014, Lance R. Martin (“Plaintiff”), a state prisoner currently
24 incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, and
25 proceeding pro se, filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C.
26 § 1983. Plaintiff did not prepay the \$400 filing fee mandated by 28 U.S.C. § 1914(a);
27 instead, he filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C.
28 § 1915(a) (ECF Doc. No. 2).

1 The Court granted Plaintiff's Motion to Proceed IFP and sua sponte dismissed his
 2 Complaint for failing to state a claim upon which relief could be granted pursuant to 28
 3 U.S.C. § 1915(e)(2) & § 1915A (ECF Doc. No. 3.) Plaintiff was granted leave to file an
 4 amended complaint in order to correct the deficiencies of pleading identified in the
 5 Court's Order. (*Id.*) On February 17, 2015, Plaintiff filed his First Amended Complaint
 6 ("FAC") and approximately one month later, Plaintiff filed supplemental exhibits to his
 7 FAC (ECF Doc. Nos. 14, 16.)

8 The Court, once again, conducted the required sua sponte screening and found that
 9 Plaintiff had not corrected the deficiencies in his pleading previously identified by the
 10 Court. Thus, Plaintiff's FAC was dismissed for failing to state a claim upon which relief
 11 could be granted on April 20, 2015. (ECF Doc. No. 17.) On May 20, 2015, Plaintiff
 12 filed his Second Amended Complaint ("SAC") (ECF Doc. No. 21.)

13 II.

14 SUA SPONTE SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B) AND 1915A(b)

15 A. Standard of Review

16 As the Court previously informed Plaintiff, notwithstanding Plaintiff's IFP status
 17 or the payment of any partial filing fees, the Prison Litigation Reform Act ("PLRA")
 18 obligates the Court to review complaints filed by all persons proceeding IFP and by
 19 those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of,
 20 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 21 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 22 practicable after docketing." See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 23 statutes, the Court must sua sponte dismiss complaints, or any portions thereof, which
 24 are frivolous, malicious, fail to state a claim, or which seek damages from defendants
 25 who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v. Smith*, 203
 26 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621
 27 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

1 All complaints must contain “a short and plain statement of the claim showing that
 2 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are
 3 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
 4 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 5 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
 6 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
 7 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*
 8 The “mere possibility of misconduct” falls short of meeting this plausibility standard.
 9 *Id.*; see also *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

10 “When there are well-pleaded factual allegations, a court should assume their
 11 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
 12 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
 13 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
 14 allegations of material fact and must construe those facts in the light most favorable to
 15 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
 16 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

17 However, while the court “ha[s] an obligation where the petitioner is pro se,
 18 particularly in civil rights cases, to construe the pleadings liberally and to afford the
 19 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
 20 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
 21 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents*
 22 *of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

23 **B. Access to Courts Claims**

24 Plaintiff continues to claim that Defendants have delayed in mailing confidential
 25 legal mail that he has submitted to them. Prisoners have a constitutional right to access
 26 to the courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). The right is limited to the filing
 27 of direct criminal appeals, habeas petitions, and civil rights actions. *Id.* at 354. Claims
 28 for denial of access to the courts may arise from the frustration or hindrance of “a

1 litigating opportunity yet to be gained” (forward-looking access claim) or from the loss
2 of a suit that cannot now be tried (backward-looking claim). *Christopher v. Harbury*,
3 536 U.S. 403, 412-15 (2002); *see also Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir.
4 2011) (differentiating “between two types of access to court claims: those involving
5 prisoners’ right to affirmative assistance and those involving prisoners’ rights to litigate
6 without active interference.”).

7 However, as this Court’s previous Order explained, a plaintiff must allege “actual
8 injury” as the threshold requirement to any access to courts claim. *See Lewis*, 518 U.S.
9 at 351-53; *Silva*, 658 F.3d at 1104. An “actual injury” is “actual prejudice with respect
10 to contemplated or existing litigation, such as the inability to meet a filing deadline or
11 to present a claim.” *Lewis*, 518 U.S. at 348; *see also Jones v. Blanas*, 393 F.3d 918, 936
12 (9th Cir. 2004) (defining actual injury as the “inability to file a complaint or defend
13 against a charge”). The failure to allege an actual injury is “fatal.” *Alvarez v. Hill*, 518
14 F.3d 1152, 1155 n.1 (9th Cir. 2008) (“Failure to show that a ‘non-frivolous legal claim
15 had been frustrated’ is fatal.”) (quoting *Lewis*, 518 U.S. at 353 & n.4).

16 In addition, the prisoner must allege the loss of a “non-frivolous” or “arguable”
17 underlying claim. *See Harbury*, 536 U.S. at 413-14. The nature and description of the
18 underlying claim must be set forth in the pleading “as if it were being independently
19 pursued.” *Id.* at 417. Finally, the plaintiff must specifically allege the “remedy that may
20 be awarded as recompense but not otherwise available in some suit that may yet be
21 brought.” *Id.* at 415.

22 Plaintiff’s SAC fails to allege the actual injury required to state an access to courts
23 claim. *See Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. Specifically, he has
24 failed to allege how the delay in the mailing of legal documents resulted in an “actual
25 prejudice with respect to contemplated or existing litigation, such as the inability to meet
26 a filing deadline or to present a claim.” *Lewis*, 518 U.S. at 348; *Jones*, 393 F.3d at 936;
27 *Iqbal*, 556 U.S. at 678. The basis of Plaintiff’s claim is the alleged failure to process his
28 legal mail which consisted of a “‘proposed’ order to produce prisoner” for unspecified

1 proceedings in San Diego Superior Court. (SAC at 11.) Even if Plaintiff was denied the
 2 right to personally appear by the state court, there are no allegations that Plaintiff had
 3 any action relating to his conditions of confinement or criminal proceedings dismissed
 4 due to the alleged delay in mailing documents by prison officials.

5 In addition, once again, Plaintiff's SAC also fails to identify or even nominally
 6 describe the non-frivolous or arguable nature of the underlying cause of action he either
 7 anticipated or lost as a result of Defendants' actions. *Harbury*, 536 U.S. at 416 ("[L]ike
 8 any other element of an access claim[,] . . . the predicate claim [must] be described well
 9 enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of the
 10 underlying claim is more than hope.").

11 For these reasons, the Court finds, once again, that Plaintiff's access to courts
 12 claims must be dismissed for failing to state a plausible claim upon which § 1983 relief
 13 can be granted. *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b)(1); *Iqbal*, 556 U.S. at 678.

14 C. Legal Mail

15 Throughout his SAC, Plaintiff also claims that Defendants tampered with his legal
 16 mail. The mail that he describes is mail that he sent to, or received from, various courts.
 17 However, while mail from his legal counsel can constitute "legal mail," mail from the
 18 courts is not legal mail. *See Keenan v. Hall*, 83 F.3d 1083, 1094 (9th Cir. 1996).

19 III.

20 CONCLUSION AND ORDER

21 For the reasons set forth above, the Court:

22 1. **DISMISSES** this civil action without prejudice for failing to state a claim
 23 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and
 24 § 1915A(b)(1).

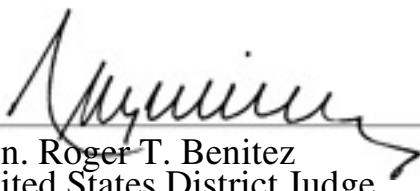
25 2. **DENIES** Plaintiff leave to amend as futile. *See Cahill v. Liberty Mut. Ins.*
 26 *Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial of a leave to amend is not an abuse of
 27 discretion where further amendment would be futile); *see also Robinson v. Cal. Bd. of*
 28 *Prison Terms*, 997 F. Supp. 1303, 1308 (C.D. Cal. 1998) ("Since plaintiff has not, and

1 cannot, state a claim containing an arguable basis in law, this action should be dismissed
2 without leave to amend; any amendment would be futile.”) (citing *Newland v. Dalton*,
3 81 F.3d 904, 907 (9th Cir. 1996)).

4 The Clerk of Court shall close the file.

5 **IT IS SO ORDERED.**

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7 DATED: July 13, 2015

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10 Hon. Roger T. Benitez
11 United States District Judge
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